

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALMA REZA

Appeal No. 2003-2046
Application 09/171,670

ON BRIEF

Before ADAMS, MILLS, and POTEATE, ***Administrative Patent Judges***.
POTEATE, ***Administrative Patent Judge***.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1-16 and 29. Claims 17-21, 24 and 30 are also pending, but have been withdrawn from consideration as directed to a non-elected invention. See Appeal Brief, Paper No. 20, received March 17, 2003, page 1.

Appeal No. 2003-2046
Application 09/171,670

Claim 1 is representative of the subject matter on appeal and is reproduced below:

1. A method for manufacturing a composition comprising crushing tomatoes and apples, mixing the crushed tomatoes and apples together in a weight ratio of tomatoes to apples between 0.8 and 1.25 to produce a mixture (M), allowing the mixture (M) to stand for about twenty-four hours, and filtering the mixture (M) after the standing for about twenty-four hours to produce a filtered liquid as the composition.

The references relied upon by the examiner are:

Strobel et al. (Strobel) 4,971,813 Nov. 20, 1990

Grieve, M., "Papaw," A Modern Herbal, copyright 1995-2002, pp. 1-2.

GROUND'S OF REJECTION

1. Claims 1-10, 13-16 and 29 stand rejected under 35 U.S.C. § 103 as unpatentable over Strobel.

2. Claims 11 and 12 stand rejected under 35 U.S.C. § 103 as unpatentable over Strobel, further in view of Grieve.

We reverse as to both grounds of rejection.

DISCUSSION

The initial burden of presenting a **prima facie** case of obviousness rests on the examiner. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). In order to establish a **prima facie** case of obviousness, the examiner must identify a suggestion or motivation to modify the teachings of the cited references to achieve the claimed invention. *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000). In the present case, we find that the examiner has failed to satisfy his burden of proof and, therefore, has failed to establish a **prima facie** case of obviousness. Accordingly, the rejections are reversed for the reasons set forth in greater detail below.

The invention is directed to a method for manufacturing a composition comprising crushing tomatoes and apples, allowing the mixture to stand and then filtering the mixture. Claim 1. The filtered liquid may be used in dermatological formulations. Appeal Brief, page 2.

It is the examiner's position that Strobel teaches the invention as claimed with the exception that "Strobel does not explicitly teach mixing the crushed fruits and vegetables or the

addition of capsaicin." Examiner's Answer, Paper No. 21, mailed May 27, 2003, page 4. As pointed out by the examiner, the claims are directed to a method of making a "composition" and do not include any limitations relating to dermatological applications. Examiner's Answer, page 5. Therefore, like the examiner, we are unpersuaded by appellant's initial argument that Strobel is non-analogous art.

Appellant further traverses the examiner's argument by pointing out that several notable differences exist between Strobel's process and that of the claimed invention. In particular, appellant notes that the present claims require mixing crushed tomatoes and apples together while Strobel's process is limited to manufacturing a juice from a single type of fruit or vegetable. See Appeal Brief, page 5. Additionally, appellant notes that Strobel filters the squeezed/pressed fruit or vegetable to remove the solids prior to fermenting the juice. Conversely, in appellant's process, the mixture of crushed tomatoes and apples is allowed to stand and ferment prior to filtering. See *id.*; claim 1.

Responsive to appellant's arguments, the examiner urges that although Strobel does not exemplify preparing a blend of

juices, he does teach that beverages can contain blends. See Examiner's Answer, page 8, referencing Strobel, column 4, lines 4-10. We find that the examiner has mischaracterized the referenced portion of Strobel. As pointed out by appellant, Strobel does not teach mixing two crushed fruits and/or vegetables. See Appeal Brief, page 5. Rather, Strobel teaches that individual juice concentrates (i.e., post filtration and fermentation) may be mixed together to provide a blend. ***Id.***

With respect to the differences in processing steps between Strobel and the claimed invention, the examiner asserts that:

It is within the skill in the art to use conventional methods and ingredients for making a composition in any combination or order and expect similar results. See *In re Levin*, 84 USPQ 232 (CCPA 1949). Nothing critical is seen in the conventional steps and ingredients instantly claimed. Nothing critical has been shown in the length of the standing time. Assertions of unexpected results do not provide patentability to the claims. Strobel teaches at column 4, lines 409 [sic, 4-9] that blended beverages or juices are useful. One of ordinary skill in the art would expect any combination of the disclosed fruits or vegetables to be useful in the reference composition. [Examiner's Answer, page 4]

We do not find these arguments persuasive. The examiner is reminded that the initial burden of proof is on the Patent Office

to show nonobviousness. The suggestion or motivation to modify a reference may be implicit from the prior art as a whole rather than expressly stated. **Kotzab**, 217 F.3d at 1370, 55 USPQ2d at 1316-17. However, regardless of whether the examiner relies on an express or implicit showing, he must provide reasons for finding a limitation to be taught or suggested in the reference. **Id.** Reliance on "common knowledge and common sense" does not fulfil the requirement to provide reasons in support of findings of obviousness. **In re Thrift**, 298 F.3d 1357, 1364, 63 USPQ2d 2002, 2006 (Fed. Cir. 2002) (quoting **In re Lee**, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002)). The remaining reference relied upon by the examiner, Grieve, fails to remedy the deficiencies in the teachings of Strobel.

Appeal No. 2003-2046
Application 09/171,670

Accordingly, we find that the examiner has failed to establish a ***prima facie*** case of obviousness and the rejections are reversed.

REVERSED

DONALD E. ADAMS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
DEMETRA J. MILLS)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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LINDA R. POTEATE)	
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LRP:psb

Appeal No. 2003-2046
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